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AUTHORITIES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 222

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR

v.

THE NATIONAL EXCHANGE BANK OF BALTIMORE, MARYLAND

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The District Court filed no opinion. The opinion of the Circuit Court of Appeals was filed on September 29, 1924, and is reported in 1 F. (2nd) 888. It appears in the transcript of record, pages 11 to 14, inclusive.

JURISDICTION

The Circuit Court of Appeals rendered a judgment, dated September 29, 1924 (R. 15), affirming a judgment of the District Court for the District of Maryland, dated December 3, 1923, which sustained a demurrer to the declaration (R. 7). A writ of error was allowed on December 1, 1924 (R. 17), under Section 241 of the Judicial Code (since repealed by the Act of February 13, 1925).

STATEMENT OF FACTS

This action was brought by the United States, the plaintiff in error (hereinafter referred to as the plaintiff), to recover from the defendant in error (hereinafter referred to as the defendant) the difference between $4,750, the amount paid by the plaintiff to the defendant upon a check which was fraudulently raised to that amount after it had been issued and delivered to the payee, and $47.50, the amount for which the check was originally issued.

The allegations of the declaration may be briefly stated as follows (R. 1–3):

On June 1, 1922, at Washington, D. C., William H. Holmes, Disbursing Clerk, through C. M. Graney, Deputy Disbursing Clerk, drew and issued a United States Veterans' Bureau check upon the Treasurer of the United States, the plaintiff, in favor of one Beck, as payee, for $47.50. After issue and delivery to Beck the check was fraudu-

lently raised to $4,750. Beck, on or about June 3, 1922, endorsed the check for value to the Bank of Commerce, Spartanburg, South Carolina, and received $4,750 for it. The Bank of Commerce, Spartanburg, South Carolina, thereafter endorsed the check "Pay to the order of Any Bank, Banker or Trust Company. All prior endorsements guaranteed, June 3, 1922, Bank of Commerce, Spartanburg, S. C." and negotiated it for value in the usual course of business to the defendant, receiving for it from the defendant $4,750. The defendant endorsed the check "Received payment through the Baltimore Clearing House, Endorsements Guaranteed, June 5, 1922, National Exchange Bank, Baltimore, Joseph W. Leffler, Cashier," and negotiated it for value in the usual course of business to the Baltimore Branch of the Federal Reserve Bank of Richmond, the agent of the plaintiff, and received for it $4,750, the Baltimore Branch of the Federal Reserve Bank of Richmond not having notice that the check had been raised. The Baltimore Branch of the Federal Reserve Bank of Richmond, the agent of the plaintiff, forwarded the check to the Treasurer of the United States, and was given credit therefor for the sum of $4,750, although the check as issued called for the payment of only $47.50, the Treasurer not having notice that the check had been raised. Neither the defendant, nor any one for it, nor any other en-

dorser upon the check, has ever paid the plaintiff the difference between the sum called for by the check as altered and the sum for which it was drawn and issued, although demand has been duly made upon the defendant to do so.

The defendant demurred to the declaration, alleging two grounds for the contention that the declaration does not state a cause of action against the defendant, as follows (R. 5):

> That it appears from said Declaration that the Defendant was a "collecting" bank, holding the check mentioned in the Declaration for collection only, and that the proceeds thereof were paid to the bank sending said check to the Defendant, but it does not appear from said Declaration that the Plaintiff made demand on the Defendant for the return of the money paid on said check, *before* it was so remitted by the Defendant to its correspondent; and the Plaintiff cannot recover against the Defendant in this action, unless the Plaintiff did make such demand *before* it remitted the proceeds to its principal.
>
> That it appears from said Declaration that the Plaintiff was both the drawer and drawee of the check mentioned in said Declaration, that said check was "raised" before coming into the hands of the Defendant, which had no knowledge of that fact and which paid out the proceeds thereof, and that the ~~Defendant~~ Plaintiff paid the said check upon pre-

> sentation; and therefore, as the Plaintiff was both the drawer and drawee of said check, and as one of the parties must suffer, both of whom have equal equities, the legal title will prevail, and this action will not lie against the Defendant.

The District Court sustained the demurrer. (R. 6.) The plaintiff declining to amend the declaration, judgment was entered for the defendant. (R. 6–7.) A writ of error from the Circuit Court of Appeals for the Fourth Circuit was granted. (R. 10.) The Circuit Court of Appeals affirmed the judgment of the District Court on the ground that the United States was both the drawer and the drawee of the check in question, and that one who accepts a forged or raised instrument purporting to be his own and pays the face amount thereof to an innocent holder can not recover the amount so paid. (R. 13–14.) The Circuit Court of Appeals stated that it did not find it necessary to pass upon the question whether the endorsement placed upon the check by the Bank of Commerce showed that the defendant was nothing more than an agent to collect, or the question whether, no matter what significance might be given to the endorsement, it was permissible under the declaration to show that the defendant was in fact the real owner of the check. (R. 12–13.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred in affirming the ruling of the District Court sustaining the demurrer to the declaration, and in affirming the judgment entered by the District Court against the plaintiff and in favor of the defendant, and in thus holding that the loss resulting from the raising of the check must fall on the United States.

ARGUMENT

SUMMARY

I. It is a general rule that a payment made under a mistake of fact may be recovered. There is, it is true, an exception to this rule in the case of commercial paper. This exception is that where, from the situation of the parties, the person paying an instrument may be assumed to know certain facts concerning the instrument, he can not recover the payment because of a mistake as to those facts. Thus a drawee may be assumed to know his drawer's signature and can not recover a payment made upon an instrument to which the drawer's signature is a forgery, but ordinarily it can not be assumed that the drawee knows the amount of the instrument or anything more than the signature of the drawer, and he may therefore recover any amount paid on a raised instrument in excess of the amount originally called for. However, if the drawer and the drawee are the same

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person, he may be assumed to know the amount of the instrument as well as his own signature and can not recover a payment made on an instrument the amount of which has been fraudently raised. In the present case the drawer and the drawee were not the same; the drawer was a disbursing clerk in the Veterans' Bureau and the drawee was the Treasurer of the United States. That both were agents of the United States is no basis for an assumption that the Treasurer knew, or should have known, all facts known to the disbursing clerk. The case is therefore within the general rule that a payment made under a mistake of fact may be recovered, and not within the exception thereto.

II. It is no doubt true, on general principles of agency, that where one holds commercial paper, not as the owner thereof, but merely for collection as agent for another, the drawee who pays the paper with knowledge or notice of the agency can not recover from the agent if he has paid the proceeds over to his principal before receiving notice of any defect in the paper. But in this case it appears from the declaration that the defendant received the check for value in the usual course of business and was not merely an agent to collect, and therefore the plaintiff can recover without alleging that the defendant, before paying over the proceeds to the bank from which it received the check, had notice that the check had been fraudulently raised.

I

THE DRAWER AND THE DRAWEE OF THE CHECK WERE NOT THE SAME IN ANY SUCH SENSE AS TO CHARGE THE DRAWEE WITH KNOWLEDGE OF THE AMOUNT OF THE CHECK, AND THE CASE IS WITHIN THE GENERAL RULE THAT A PAYMENT MADE UNDER A MISTAKE OF FACT MAY BE RECOVERED

The general rule that a payment made under a mistake of fact may be recovered is not questioned. The defendant has contended, however, that the present case is within an exception to the general rule first noted in *Price* v. *Neal*, 3 Burrow's Rep. 1354. In that case bills of exchange were paid by the drawee. The drawer's signature was a forgery, but this fact was not known by either the drawee or the holder. Upon discovery of the fraud, the drawee brought an action against the holder to recover back the money paid. Lord Mansfield held that he could not recover.

Professor Ames, in an article entitled, "The Doctrine of Price vs. Neal," in 4 Harvard Law Review 297, contended that the doctrine of *Price* v. *Neal* is based upon the rule that, as between two parties having equal equities, one of whom must suffer, the legal title will prevail, and that, therefore, where both the drawee and the holder of an instrument are innocent, the drawee should not recover money paid to the holder although the signature to the instrument is forged or the amount

raised. The American cases, however, as admitted by Professor Ames, have not adopted this view, but have held that the doctrine of *Price* v. *Neal* applies only where the circumstances are such that the drawee may properly be charged with knowledge that the signature to an instrument is forged or that the amount thereof has been raised. Thus in *United States* v. *National Exchange Bank*, 214 U. S. 302, in which it was held that the United States could recover amounts paid on pension checks, endorsements on which had been forged, Mr. Justice White, delivering the opinion of the Court, after referring to *Price* v. *Neal* and other cases in England enforcing "an exceptional rule * * * as to commercial paper, by which, under particular circumstances, such paper is taken out of the operation of the general rule relating to the recovery of money paid by mistake," said (p. 311):

> The decisions referred to, however, show that the exception was limited to cases where the person who paid a forged instrument and who sought recovery of the amount paid was charged with knowledge of the genuine signature of the person whose name was forged, and, therefore, was presumed to have been negligent in making the payment. For instance, where one accepted a draft purporting to be drawn upon him by a customer whose signature he was presumed to know, which afterward turned out to be a forgery.

And on page 317 the opinion continued:

> The exceptional rule as to certain classes of commercial paper proceeds upon an assumption of knowledge or duty to know, naturally arising from the situation of the parties, entirely consonant with their capabilities, and in accord with the common sense view of their relation. To apply the rule, however, to the Government and its duty in paying out the millions of pension claims, which are yearly discharged by means of checks, would require it to be assumed that that was known, or ought to have been known, which on the face of the situation was impossible to be known, would besides wholly disregard the relation between the parties and would also require that to be assumed which the obvious dictates of common sense make clear could not be truthfully assumed.

Applying the above principles, it has been held in a number of cases in this country that the drawee of an instrument, by accepting it or paying it, vouches for the genuineness of the signature of the drawer, because he must be presumed to know such signature, but does not vouch for the genuineness of the body of the instrument, because it can not be assumed that he has any knowledge with respect thereto.

Espy v. *Bank of Cincinnati*, 18 Wall. 604.
White v. *Continental National Bank*, 64 N. Y. 316.
Parke v. *Roser*, 67 Ind. 500.

City Bank v. *National Bank,* 45 Tex. 203.
Redington v. *Woods,* 45 Cal. 406.

In *Espy* v. *Bank of Cincinnati,* it was held that a statement by a bank officer that a check was good meant only that the drawer's signature was genuine and that he had sufficient funds to pay it, and did not entitle the holder to recover from the bank when it appeared that the amount of the check had been fraudulently raised. On pages 621–622, the Court said:

> * * * we are of opinion that the Circuit Court was right in holding that in the absence of anything tending to direct his attention to other matters, the bank officer had a right to suppose that information was desired of him only in regard to the signature of the drawers and the state of their account. These were material facts to be known, which both common sense and commercial law presumed to be within his knowledge. The answer he gave that the check was good or was all right must be supposed to be responsive only to these two points. The genuineness of the payee's name and of the sum filled in the body of the check were as well known and as easily ascertainable by the payees themselves as by the bank officer, and unless the inquiry was so framed as to call his attention to these points, he had no reason to suppose, in the nature of the transaction, that he was expected to give information in regard to them.

It is on the same principle that where the drawer and the drawee of an instrument are the same, the drawee ordinarily can not recover from an innocent holder an amount which he has paid on the instrument, even though it appears that the amount has been fraudulently raised, because he may properly be charged with knowledge of the amount of an instrument issued by himself. *United States Bank* v. *Bank of Georgia*, 10 Wheat. 333.

In *Cooke* v. *United States*, 91 U. S. 389, it was held that the purchase by an assistant treasurer in New York of counterfeit notes purporting to be Treasury notes, endorsed by the holders "Pay to Secretary of the Treasury for redemption," did not constitute an adoption of the notes, and that the United States could recover the money paid therefor. On pages 396–397, the Court said:

> It is, undoubtedly, also true, as a general rule of commercial law, that where one accepts forged paper purporting to be his own, and pays it to a holder for value, he cannot recall the payment. The operative fact in this rule is the acceptance, or more properly, perhaps, the adoption, of the paper as genuine by its apparent maker. Often the bare receipt of the paper accompanied by payment is equivalent to an adoption within the meaning of the rule; because, as every man is presumed to know his own signature, and ought to detect its forgery by simple inspection, the examination which

he can give when the demand upon him is made is all that the law considers necessary for his protection. He must repudiate as soon as he *ought* to have discovered the forgery, otherwise he will be regarded as accepting the paper. Unnecessary delay under such circumstances is unreasonable; and unreasonable delay is negligence, which throws the burden of the loss upon him who is guilty of it, rather than upon one who is not. * * *

When, therefore, a party is entitled to something more than a mere inspection of the paper before he can be required to pass finally upon its character,—as, for example, an examination of accounts or records kept by him for the purpose of verification,—negligence sufficient to charge him with a loss cannot be claimed until this examination ought to have been completed. If, in the ordinary course of business, this might have been done before payment, it ought to have been, and payment without it will have the effect of an acceptance and adoption. But if the presentation is made at a time when, or at a place where, such an examination cannot be had, time must be allowed for that purpose; and, if the money is then paid, the parties, the one in paying and the other in receiving payment, are to be understood as agreeing that a receipt and payment under such circumstances shall not amount to an adoption, but that further inquiry may be made, and, if the paper is found to be counterfeit, it may be

> returned within a reasonable time. What is reasonable must in every case depend upon circumstances; but, until a reasonable time has in fact elapsed, the law will not impute negligence on account of delay.

Bearing in mind the underlying principle that an exception to the general rule that money paid under a mistake of fact can be recovered, is made only when there is "an assumption of knowledge or duty to know, naturally arising from the situation of the parties, entirely consonant with their capabilities, and in accord with the common sense view of their relation," it is apparent that a drawee can be charged with knowledge of the amount of an instrument only where he is actually, individually, also the drawer, or where both the drawer and the drawee are located in the same bank or other office and acting for the same principal, or in some similar situation. The situation of the parties which may give rise to an assumption of knowledge or duty to know the amount of an instrument on the part of the drawee, is the actual situation, not a situation based upon any legal fiction that because the drawer and the drawee are agents for the same principal they are necessarily identical. In the present case, the United States authorized the disbursing clerk to make certain payments and authorized the Treasurer to honor checks drawn by the disbursing clerk up to certain amounts. The disbursing clerk was the drawer of the check in question and the Treasurer was the

drawee; the United States was neither the drawer nor the drawee, although both the drawer and the drawee were acting as its agents. A common sense view of the relation of the parties negatives any assumption that the Treasurer of the United States knows, or is under a duty to know, the amounts of all checks drawn upon him by disbursing officers authorized to make payments for the manifold purposes of the Government in all parts of the world.

The above view is supported by *United States* v. *Chase National Bank*, 252 U. S. 485. In that case the Treasurer of the United States paid to an innocent collecting bank the amount of a forged check purporting to be drawn by a disbursing officer of the United States. The court, in holding that the United States could not recover, treated the Treasurer as drawee and the disbursing officer as apparent drawer, and there was no intimation that they were to be regarded as the same person. On page 496 it was said:

> The equities of the drawee who has paid are not superior to those of the innocent collecting bank who had full right to act upon the assumption that the former knew the drawer's signature or at least took the risk of a mistake concerning it.

A similar case is *United States* v. *Bank of New York, Nat. Banking Ass'n.* (C. C. A. 2nd Circuit), 219 Fed. 648.

The defendant contended in the court below that Section 62 of the Uniform Negotiable Instruments

Law (Article 13, Section 81, of the Maryland Code of Public General Laws) makes the doctrine of *Price* v. *Neal* applicable to a raised check as well as to one on which the drawer's name is forged, even in cases where the drawer and drawee are not the same. The section in question is as follows:

> The acceptor, by accepting the instrument, engages that he will pay it according to the tenor of his acceptance; and admits:
>
> 1. The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and
>
> 2. The existence of the payee and his then capacity to indorse.

In Professor Ames' opinion, the effect of this section is that for which the defendant contends. Brannan's Negotiable Instruments Law (3d Ed.), 225. But Professor Ames' view of the effect of the section is no doubt colored by his view, entertained before the adoption of the statute, of the scope of the doctrine of *Price* v. *Neal,* which, as heretofore pointed out, was not adopted by this Court.

Both the language and the arrangement of the section seem to negative the meaning the defendant seeks to ascribe to it. The acceptor engages to pay "according to the tenor *of his acceptance,*" not according to the tenor of the instrument. By this provision, an acceptance constitutes an engagement to pay the instrument, if valid, and at its proper amount, which is not necessarily its face

amount, according to the terms of the acceptance, but does not waive any defense based upon the invalidity or amount of the instrument itself. The provision clearly refers to Sections 139 and 141 of the Negotiable Instruments Law (Article 13, Sections 158 and 160, of the Maryland Code of Public General Laws).

Under Section 139 an acceptance is either general or qualified. Section 141 provides as follows:

> An acceptance is qualified, which is:
>
> 1. Conditional, that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated;
>
> 2. Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn;
>
> 3. Local, that is to say, an acceptance to pay only at a particular place;
>
> 4. Qualified as to time;
>
> 5. The acceptance of some one or more of the drawees, but not of all.

If the interpretation of Section 62 for which the defendant contends should be adopted, and an acceptance should be regarded as an unqualified engagement to pay regardless of the validity or invalidity of the instrument itself, all of the section except the first clause would be mere surplusage to which no logical purpose could be ascribed. Under such an interpretation there would be no need for providing that the acceptor, by accepting the instrument, admits the facts set forth in the section, because he would be bound to pay regardless

of the existence of the drawer, the genuineness of his signature, or his capacity or authority to draw the instrument. It seems clear, therefore, that the first clause refers only to the nature of the acceptance, and the remainder of the section to the facts bearing upon the validity or invalidity of the instrument which are admitted by the acceptor. These facts include "the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument," but do not include the amount of the instrument. The statute, therefore, far from changing the rule that a drawee is not charged with knowledge of a change in the amount of an instrument, seems clearly to recognize that rule.

Further, in the only two cases we have found in which the question has arisen since the adoption of the Negotiable Instruments Law, the rule has been applied unchanged by Section 62. *McClendon* v. *Bank of Advance*, 188 Mo. App. 417; *Interstate Trust Company* v. *United States National Bank*, 67 Colo. 6. The three cases cited by the defendant in the court below as approving Professor Ames' view that Section 62 changes the rule previously existing and prevents a drawee from recovering an amount paid on a fraudulently raised instrument, ***American Hominy Company*** v. ***Milliken National Bank,*** 273 Fed. 550; ***First National Bank*** v. ***United States National Bank,*** 100 Ore. 264; and *Cherokee National Bank* v. *Union Trust Company,* 33 Okla. 342, are not in point.

While in each of them Professor Ames' opinion is referred to with apparent approval, each involved an instrument to which the drawer's signature had been forged and not a raised instrument. In each, therefore, the doctrine of *Price* v. *Neal* was manifestly applicable, regardless of the effect of Section 62 of the Negotiable Instruments Law.

II

IT APPEARS FROM THE DECLARATION THAT THE DEFENDANT RECEIVED THE CHECK IN THIS CASE FOR VALUE IN THE USUAL COURSE OF BUSINESS, AND NOT AS A MERE AGENT TO COLLECT, AND THEREFORE THE PLAINTIFF CAN RECOVER WITHOUT ALLEGING THAT THE DEFENDANT, BEFORE PAYING OVER THE PROCEEDS TO THE BANK FROM WHICH IT RECEIVED THE CHECK, HAD NOTICE THAT THE CHECK HAD BEEN FRAUDULENTLY RAISED

It is no doubt true that where payment is made on an instrument, the amount of which has been raised, to one who holds it not as owner but merely for collection as the agent of another, and the fact of such agency is known to the drawee, the agent can not be compelled to repay if he has paid the proceeds of the instrument over to his principal before receiving notice of the mistake. But in this case the declaration alleges that the check was negotiated to the defendant for value in the usual course of business. The defendant argued in the court below, however, that this allegation was

merely a conclusion of law which was of no avail to the plaintiff in view of the fact that the endorsements on the check were set out in full in the declaration, and that the endorsements negatived the conclusion of law so drawn by the pleader. This might be true if the endorsement to the defendant clearly constituted it merely an agent for collection and not the owner of the check, but unless the endorsement had such effect the defendant must be regarded on the pleadings in this case as the owner of the check. And, in order for the defendant to succeed in its defense on the ground that it was an agent, it is not enough that the endorsement to it might have constituted it either a mere agent to collect or the owner of the check, and that the true effect of the endorsement might have been shown in a trial upon the merits; it must appear that the endorsement was inconsistent with any interpretation except that the defendant was a mere agent to collect. Agency is a fact, the burden of proving which rests upon the party affirming its existence; consequently the alleged agency of the defendant was matter of defense which the declaration was not required to negative. *Schutz* v. *Jordan,* 141 U. S. 213; *Woods* v. *Colony Bank,* 114 Ga. 683; 2 C. J. 923. It is necessary, therefore, to consider the effect of the endorsement placed upon the check by the Bank of Commerce, Spartanburg, South Carolina, " Pay to the order of Any Bank, Banker, or Trust Com-

pany, All prior endorsements guaranteed, June 3, 1922, Bank of Commerce, Spartanburg, S. C.," in order to ascertain whether this necessarily and conclusively constituted the defendant a mere agent to collect.

The Negotiable Instruments Law contains the following provisions (Article 13 of the Maryland Code of Public General Laws, Sections 50, 52, 53, 55-57):

> 31. The indorsement must be written on the instrument itself or upon paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement.
>
> 33. An indorsement may be either special or in blank; and it may be either restrictive or qualified, or conditional.
>
> 34. A special indorsement specifies the person to whom, or to whose order, the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery.
>
> 36. An indorsement is restrictive, which either:
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> (1) Prohibits the further negotiation of the instrument; or
>
> (2) Constitutes the indorsee the agent of the indorser; or
>
> (3) Vests the title in the indorsee in trust for or to the use of some other person. But

the mere absence of words implying power to negotiate does not make an indorsement restrictive.

37. A restrictive indorsement confers upon the indorsee the right:

(1) To receive payment of the instrument;

(2) To bring any action thereon that the indorser could bring;

(3) To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so.

But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement.

38. A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words "without recourse," or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument.

There is no question that the endorsement placed on the check by the Bank of Commerce was a special endorsement. But there is nothing on the face of the endorsement which constitutes it a restrictive endorsement. Section 31 of the Negotiable Instruments Law, quoted above, requires an endorsement to be written on the instrument itself or upon paper atached thereto, and it is a fair inference from the section that any restrictions intended to be placed upon the effect of the endorsement must be expressed on the instrument itself

or upon paper attached thereto. Otherwise, if restrictions not so expressed may be relied on by an endorser of commercial paper, the free negotiablity of commercial paper will be seriously impeded.

That an endorsement such as that under consideration is not a restrictive endorsement has been held in *National Bank of Commerce* v. *Bossemeyer*, 101 Neb. 96; *Interstate Trust Company* v. *United States National Bank*, 67 Colo. 6; and *New York Produce Exchange Bank* v. *Twelfth Ward Bank*, 135 App. Div. 52. In *National Bank of Commerce* v. *Bossemeyer*, the court said (p. 100):

> Is the indorsement restrictive? Whatever may have been held before the enactment of the negotiable instruments act, it is clear that this question must be determined by the provisions of that statute. * * *
>
> There is nothing on the face of this indorsement which prohibits the further negotiation of the instrument or constitutes the indorsee the agent of the indorser, or vests title in the indorsee in trust for the use of some other person, and hence, by the most elementary principles of statutory construction, the plain meaning of the language must be observed, and it must be held that the indorsement was not restrictive.

In *Interstate Trust Company* v. *United States National Bank*, 67 Colo. 6, the court, after holding an endorsement such as that in question not restrictive, said (p. 10):

> It is also urged by plaintiffs in error that by reason of certain rules and regulations of the Denver Clearing House, with which all banks are familiar, the endorsements in question are taken to be collection endorsements only, and therefore regardless of what the law may be, defendants in error are in effect estopped to deny that the endorsements are collection endorsements only. It is well settled, however, that unrestricted endorsements can not be varied either by parol evidence, or evidence of custom in business, for the reason that the statute definitely defines their meaning and controls their effect.

It is apparent in the present case, first, that the endorsement placed on the check by the Bank of Commerce is, on its face, unrestricted; second that regardless of what the defendant might prove on a trial, it does not appear from the pleadings that there is any custom among banks to use such an endorsement for collection only and not where it is the intention to transfer title to an instrument; and third, that even if there were such a custom it should not be permitted to vary the unrestricted language of the endorsement.

It is true that such indorsements have been held in Missouri to be restrictive, *Bank of Indian Territory* v. *First National Bank,* 109 Mo. App. 665; *National Bank of Rolla* v. *First National Bank of Salem,* 141 Mo. App. 719; *Citizens' Trust Company*

v. *Ward*, 195 Mo. App. 223, but none of the Missouri cases give any satisfactory reason for this result.

CONCLUSION

The declaration stated a cause of action against the defendant. The judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted.

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FEBRUARY, 1926.

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Plaintiff in Error,

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Defendant in Error.

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BRIEF ON BEHALF OF DEFENDANT IN ERROR.

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BRIEF ON BEHALF OF DEFENDANT IN ERROR.

The opinion of the United States Circuit Court of Appeals for the Fourth Circuit in this case is reported in 1 F. (2d) 888. The District Court filed no opinion.

The Jurisdiction.

This suit was instituted in the United States District Court for the District of Maryland by the United States against the National Exchange Bank, to recover the sum of $4,702.50, the difference between the amount paid by the United States on a "raised check" and the amount for which the check was originally drawn. The bank demurred to the declaration; the District Court sustained the demurrer; and the United States, declining to amend its declaration, elected to stand upon that ruling. From the judgment thereon entered for the bank on December 3rd, 1923 (R. 7), the United States sued out a writ of error to the United States Circuit Court of Appeals for the Fourth Circuit, which affirmed the judgment of the District Court on September 29th, 1924 (R. 15). From that judgment the United States prosecutes this writ of error. This case was filed in this Court December 11th, 1924 (R. 19), and was pending therein prior to the passage of the Act of February 13th, 1925, amending the Judicial Code, so is not affected thereby.

Statement of the Case.

The facts as set forth in the declaration are (R. 1-3):

On June 1st, 1922, the United States Veterans Bureau drew a check upon the Treasurer of the United States in favor of Joe Clenton Beck for $47.50. After delivery to the payee, the check was raised to $4,750. On June 3rd, 1922, the payee indorsed said check to the Bank of Commerce, Spartanburg, S. C., receiving $4,750. The Bank of Commerce indorsed the check "Pay to the Order of any Bank, Banker or Trust Co. All Prior Endorsements Guaranteed, June 3, 1922, Bank of Commerce, Spartanburg, S. C.," forwarded it to The National Exchange Bank, and received $4,750 in the usual course of business. The National Exchange Bank collected the

check through the Baltimore Clearing House, placing thereon the following stamp: "Received Payment Through the Baltimore Clearing House, Indorsements Guaranteed, June 5, 1922, National Exchange Bank, Baltimore, Joseph W. Leffler, Cashier." The check was paid through the Baltimore Clearing House by the Baltimore Branch of the Federal Reserve Bank at Richmond, acting as agent for the United States, and in turn forwarded by the Federal Reserve Bank to the Treasurer of the United States, who paid it on or about June 5, 1922.

The United States subsequently, no date being mentioned, made demand upon the National Exchange Bank for repayment of the difference between the amount of the check and the amount for which it had been originally drawn, and repayment was refused.

There is a mistake on page 5 of the Transcript of Record. In line 6 of paragraph V, the word "Defendent" should be "Plaintiff," so as to read, "the Plaintiff paid the check upon presentation." (See Stipulation, R. 19).

Summary of the Argument.

1. This action is barred by the rule that as between two parties having equal equities, one of whom must suffer, the legal title will prevail, and the action for money had and received will not lie to compel the holder to surrender his legal advantage.

2. The defendant in error, as a collecting bank, is not liable in this action, because the plaintiff in error failed to make demand for the return of the money *before* it was paid over by the defendant in error to its principal.

Argument.

1.

THIS ACTION IS BARRED BY THE RULE THAT AS BETWEEN TWO PARTIES HAVING EQUAL EQUITIES, ONE OF WHOM MUST SUFFER, THE LEGAL TITLE WILL PREVAIL, AND THE ACTION FOR MONEY HAD AND RECEIVED WILL NOT LIE TO COMPEL THE HOLDER TO SURRENDER HIS LEGAL ADVANTAGE.

That, as a general rule, a payment made under a mistake of fact may be recovered is established beyond any doubt. There is, however, an exception to this rule in the case of commercial paper. This exception was first recognized in the case of Price vs. Neal, 3 Burrow's 1354. In that case the plaintiff was the drawee of a bill of exchange, the defendant an endorsee for value in due course. The bill was paid on presentation, both the drawee and the holder being ignorant of the fact that the signature of the drawer was a forgery. Upon discovery of this fact, the plaintiff sought to recover the money on the ground that it had been paid under a mistake. The opinion of Lord Mansfield has had such a far-reaching effect, and is so applicable to the case at bar, that it is quoted in full:

> "Lord Mansfield stopped him from going on, saying that this was one of those cases that could never be made plainer by argument.
>
> "It is an action upon the case, for money had and received to the plaintiff's use, in which action, the plaintiff cannot recover the money, unless it be *against conscience* in the defendant, to *retain* it; and great liberality is always allowed, in *this sort* of action.
>
> "But it can never be thought *unconscientious* in the defendant, to *retain* this money, when he has once received it, upon a bill of exchange indorsed to him

for a fair and valuable consideration, which he had *bona fide* paid, without the least privity or *suspicion* of any forgery.

"Here was *no fraud;* no *wrong.* It was incumbent upon the *plaintiff,* to be satisfied, 'That the bill drawn upon him '*was the drawer's hand,*' before he accepted or paid it; but it was not incumbent upon the *defendant* to inquire into it. Here was notice given by the defendant to the plaintiff of a bill drawn upon him; and he sends his servant to pay it and take it up. The other bill, he actually *accepts;* after which acceptance, the defendant *innocently* and *bona fide* discounts it. The plaintiff lies by, for a considerable time after he had paid these bills; and *then* found out 'That they were forged'; and the forger comes to be hanged. He made no objection to them, at the *time* of paying them. Whatever neglect there was, was on *his* side. The defendant had actual encouragement from the plaintiff himself, for negotiating the *second* bill, from the plaintiff's having without any scruple or hesitation *paid* the first: and he paid the full value, *bona fide.* It is a misfortune which has happened without the defendant's fault or neglect. *If* there was *no* neglect in the plaintiff, yet there is no reason to throw off the loss from *one innocent* man upon *another innocent* man; but, in this case, *if* there was *any* fault or negligence in any one, it certainly was in the *plaintiff,* and *not* in the *defendant.*" (The italics are reproduced from the original report.)

The rule thus laid down by Lord Mansfield has such strong basis in natural justice that it has been generally followed. The action of assumpsit for money had and received really rests upon the same basis as a bill in equity, and a Court of Equity cannot properly interfere

to change a loss from one innocent praty to another, by compelling that other to surrender the legal advantage he has, but will let the loss remain where the course of business has placed it.

The doctrine of Price vs. Neal was early approved by this Court in Bank of the United States vs. Bank of Georgia, 23 U. S. 333. This case involved raised notes of the Bank of Georgia, which were forwarded to the Bank of Georgia by the Bank of the United States, and credit given to the Bank of the United States for the amount thereof as raised. Later, when the forgery was detected, the Bank of Georgia called on the Bank of the United States to refund the difference between the amount of the notes as raised and the amount as originally issued.

On the refusal of the Bank of the United States, suit was instituted to recover. Justice Story, in his opinion, says:

> "The case of Price vs. Neal has never since been departed from; and, in all the subsequent decisions in which it has been cited, it has the uniform support of the Court, and has been deemed a satisfactory authority."

After discussing the ruling in Gloucester Bank vs. Salem Bank, 17 Mass. 32, in which the Court refused recovery in a similar case, on the grounds that it would put the defendant in a worse position occasioned by the negligence of the plaintiff, Justice Story says:

> "But, waiving this narrower view, we think this case may be justly placed upon the broad ground, that there was an acceptance of the notes as genuine, and that it falls directly within the authorities which govern the cases of acceptance of forged drafts. If there be any difference between them, the principle

> is stronger here than there; for there, the acceptor is presumed to know the drawer's signature. Here, a fortiori, the maker must be presumed, and is bound to know his own notes. He cannot be heard to aver his ignorance, and when he receives notes purporting to be his own, without objection, it is an adoption of them as his own."

A reading of Justice Story's opinion shows the unequivocal adoption of the rule in Price vs. Neal by this Court, and as applied to the case at bar, it is to be noted that Bank of the United States vs. Bank of Georgia dealt with raised bills, and not with a forgery of the maker's signature.

Although, as has been previously stated, the doctrine in Price vs. Neal has been generally followed in the United States, England and on the Continent, many Courts in the United States have overlooked the real basis of the rule, and in so doing, by their decisions have modified it. This modification consists, generally speaking, in injecting a doctrine of negligence into the application of the rule. For instance, in Gloucester Bank vs. Salem Bank, supra, which was a case strikingly similar to Bank of the United States vs. Bank of Georgia, the Court gives as one of the reasons for refusing to permit a recovery by the plaintiff of the amount paid by it on forged bills, that to permit such a recovery would subject the defendant to a loss, which loss was really occasioned by the negligence of the plaintiff in failing to detect the forgery when the bills were presented for payment. However, the Court recognizes the rule in Price vs. Neal, as follows:

> "The question in this case is, whether, as between these parties equally innocent and ignorant, the loss shall remain where the chance of business has placed

> it; or shall be shifted back upon the Salem Bank, who may be considered as having, by good fortune, rid themselves of it. In all such cases, the just and sound principle of decision has been, that if the loss can be traced to the fault or negligence of either party, it shall be fixed upon him. Generally, where no fault or negligence is imputable, the loss has been left to remain where the course of business has placed it."

Other cases have said that the application of the rule is dependent upon the fact that the recipient of the money has been guilty of no fault nor negligence. We will not discuss these modifications of the general doctrine, because none of them would exempt the case at bar from the application of the rule. No fault nor negligence has been charged against the defendant in error, and if there was any fault or negligence in the case, it was on the part of the plaintiff in error. That the defendant in error would be placed in a much worse position by reason of the payment of the check on presentation, is evident from the refusal of the plaintiff in error to amend its declaration by alleging that the demand for repayment was made before the money had been remitted by the defendant in error to its principal.

The doctrine of Price vs. Neal has been generally approved in the United States.

> Bank of the United States vs. Bank of Georgia, 23 U. S. 333.
>
> Gloucester Bank vs. Salem Bank, 17 Mass. 32.
>
> United States vs. Chase National Bank, 252 U. S. 485.
>
> United States vs. National Exchange Bank, 214 U. S. 302.

Deposit Bank vs. Fayette National Bank, 90 Ky. 10.

Dedham National Bank vs. Everett National Bank, 177 Mass. 392.

Commercial & Farmers Nat. Bank vs. First Nat. Bank, 30 Md. 11.

For a discussion of the doctrine of Price vs. Neal, see article by Prof. Ames in 4 Harvard Law Review, 297; also, note in 10 L. R. A. (N. S.) page 49.

(a)

The distinction in applying the doctrine in Price vs. Neal between cases where the forgery is of the drawer's signature and cases where the forgery consists in raising the amount of the draft or check.

Although there is no logical reason why the rule in Price vs. Neal should not be applied in cases where the forgery consists in raising the amount of the check, as well as in cases where the drawer's signature is forged, yet this distinction has been made by many Courts, including this Court. It is to be attributed to the influence of the doctrine of negligence on the general rule as laid down by Lord Mansfield. This is shown by the fact that in drawing the distinction the statement is made that a bank is bound to know the signature of its depositor, the drawer, but is not bound to know the amount for which the check was drawn.

In Espy vs. Bank of Cincinnati, 85 U. S. 604, the amount of the check as issued had been raised, the name of the payee erased, and the name of the defendant inserted by the forger. The bank brought an action in assumpsit to recover the money paid on the check. This Court permitted recovery, and on page 619 said:

"Undoubtedly, where there exists a suspicion that

> the check has been altered in amount or in the name of the payee, the proper party to be inquired of is the maker of the check. He and he alone has the means of settling that question conclusively. The bank, as a general rule, can know this no better than the party to whom it is presented for negotiation. The latter is held by the law to know the drawer's signature, and the state of his account. It is no more bound to know or to answer beyond these two matters than the party who presents it for information."

It is to be noted that the Court says, on page 615:

> "In the case of raised or altered checks so paid by banks on which they are drawn, there are numerous well-considered cases where the right to recover has been established, when neither the party receiving nor the party paying has been in any fault or blame in the matter."

There is a manifest distinction between Bank of the United States vs. Bank of Georgia and Espy vs. Bank of Cincinnati, *and that distinction is vital in the consideration of the case at bar.* It is, that in Bank of the United States vs. Bank of Georgia, the drawer and drawee were the same person, while in Espy vs. Bank of Cincinnati they were different persons. Where the drawer and drawee are the same, the reason for excepting raised checks from the doctrine of Price vs. Neal no longer exists, and this will be seen from the fact that all the cases upholding this exception are cases in which the drawee was a third person, usually a bank. On the one hand, the argument that the drawee is not charged with knowledge of the amount for which the check was drawn disappears when the drawer and drawee are the same. And, on the other hand, the argument that the drawee is

negligent in failing to detect a forgery of the drawer's signature, but is not negligent in failing to detect an altered amount, because it has no way of knowing the amount for which the check was drawn, likewise disappears when the drawer and drawee are the same person.

This is shown by the fact that the cases making the distinction stress the negligence doctrine.

Espy vs. Bank of Cincinnati, 85 U. S. 604.
McClendon vs. Bank of Advance, 188 Mo. App. 417.

(b)

Of course, the rule laid down in Price vs. Neal as to the drawee applies with all the more force when the drawer and drawee are the same. In such cases payment is an adoption of the paper by such drawer-drawee.

Bank of the United States vs. Bank of Georgia, 23 U. S. 333.
United States vs. Bank of New York, 219 Fed. 648.
Jones vs. Miners & Merchants Bank, 144 Mo. App. 428.
Johnston vs. Commercial Bank, 27 W. Va. 343.
Cooke vs. United States, 91 U. S. 389.
Leather Manufacturers Nat. Bank vs. Morgan, 117 U. S. 96.

The rule has also been applied where the bills of lading which accompanied a draft were forged.

Hoffman vs. Bank of Milwaukee, 79 U. S. 181.
Goetz vs. Bank of Kansas City, 119 U. S. 551.

It is therefore submitted, that the opinion of Lord Mansfield, as quoted at the beginning of this section of the Brief, could be adopted word for word in the decision

of this case. The only difference is, that in Price vs. Neal, Lord Mansfield emphasizes the fact that the plaintiff actually encouraged the defendant in accepting the second bill, by the payment of the first one. It is probably from this remark that the doctrine of negligence as set forth by some of the Courts has sprung. In the case at bar, the plaintiff in error was equally at fault by paying the check on presentation, and thus encouraging the defendant in error in the payment of the proceeds to its principal, thereby placing itself in a worse position than it would have occupied if the payment had been refused on presentation.

The doctrine of Price vs. Neal is clearly applicable when we bear in mind that the check having been drawn by the authority of the United States on its Treasurer, the United States was both the drawer and drawee of it, and there is no reason why the drawee should not be charged with having adopted the check, as to the amount thereof as well as to the signature.

But the plaintiff in error contends that the drawer and drawee of the check were not the same; that "the disbursing clerk was the drawer of the check in question and the treasurer was the drawee; the United States was neither the drawer nor the drawee, although both the drawer and drawee were acting as its agents," and that "a common sense view of the relation of the parties negatives any assumption that the Treasurer of the United States knows, or is under a duty to know, the amounts of all checks drawn upon him by disbursing officers authorized to make payments for the manifold purposes of the Government in all parts of the world."

In none of the cases cited by the plaintiff in error in its brief to support this contention was the issue here

presented involved. In Espy vs. Bank of Cincinnati, 85 U. S. 604, White vs. Continental National Bank, 64 N. Y. 316, Parke vs. Roser, 67 Ind. 500, City Bank vs. National Bank, 45 Tex. 203, and Reddington vs. Woods, 45 Cal. 406, the drawer and drawee were separate and distinct parties. In United States vs. National Exchange Bank, 214 U. S. 302, the indorsements on the checks were forged. Cooke vs. United States, 91 U. S. 389, involved the purchase of counterfeit Treasury notes by an assistant treasurer who had no authority to accept them on behalf of the Government. United States vs. Chase National Bank, 252 U. S. 485, and United States vs. Bank of New York, 219 Fed. 648, both involved forged signatures of the drawer, and Price vs. Neal was applied without any discussion of the point involved in this case.

In United States vs. Bank of New York, 219 Fed. 648, it is interesting to note that the Government made the same contention in regard to a draft to which the signature of the drawer had been forged as it makes in the case at bar, and relied upon the same quotation from Mr. Justice White's opinion in United States vs. National Exchange Bank, 214 U. S. 302. In rejecting that contention the Court said (p. 651):

> "Counsel for the Government comes into Court with the statement that the Secretary of the Treasury of the United States is not presumed to know the signatures of such agents of the United States as are authorized to draw on him. It is argued that the United States is entitled to greater protection than an individual from the unauthorized and fraudulent acts of its agents. * * * We are informed that to hold the Treasury Department liable in a case such as the case at bar is not only not common sense, but is against the recognized principles of law. Atten-

tion is called to the recent case of United States vs. National Exchange Bank, 214 U. S. 302, 317, where the present Chief Justice said: 'The exceptional rule as to certain classes of commercial paper proceeds upon an assumption of knowledge or duty to know, naturally arising from the situation of the parties, entirely consonant with their capabilities, and in accord with the common sense view of their relation. To apply the rule, however, to the Government and its duty in paying out the millions of pension claims which are yearly discharged by means of checks, would require it to be assumed that that was known, or ought to have been known, which on the face of the situation was impossible to be known, would besides wholly disregard the relation between the parties and would also require that to be assumed which the obvious dictates of common sense make clear could not be truthfully assumed.' "

The Court continued (p. 652):

"The case of the United States vs. National Exchange Bank, supra, affords no support, however, for the principle which counsel for the Government ask us to recognize in this case. The rule announced in that case is in entire harmony with Price vs. Neal, supra, and with the cases which have followed it. In United States vs. National Exchange Bank, the forgery was not of the drawer's name, as in Price vs. Neal, but of the payee's name on pension warrants. The forgery of a payee's name or of an indorser's name is very different from the forgery of a drawer's name. At common law there is no obligation on the part of the drawee to know the genuineness of the signature of the payee or of an indorser. Price vs. Neal has never been applied to such cases."

And further (p. 653):

> "The contention of the Government that an exception should be made in its favor to the well established rule of Price vs. Neal must be disregarded. The number of persons who can have a right to draw bills upon the Government is relatively small, and it should protect itself as do banks and other large corporations against imposition in such cases. The Supreme Court in Cooke vs. United States, 91 U. S. 389, said: 'When the United States become parties to commercial paper, they incur all the responsibilities of private persons under the same circumstances.' And we find no warrant for saying that the United States is not bound by the same law as an individual when it enters into a transaction of this nature."

In the case of Cooke vs. United States, this Court was dealing with a very different proposition from that presented by the case at bar. In that case Cooke sold certain Treasury Notes to the Government for redemption. These notes were delivered to an assistant treasurer at New York, who paid for them, and forwarded them to the Secretary of the Treasury at Washington. The notes were counterfeit, and suit was brought by the United States to recover the amount paid. The defendant contended that payment by the assistant treasurer in New York constituted an acceptance of the notes by the Government. The Court decided the case on the ground that under the law such acceptance could only be made by the Secretary of the Treasury at Washington, and that therefore the action of the assistant treasurer in New York did not preclude the United States from suing to recover the money. The Court said (p. 402):

> "The notes were sold to the assistant treasurer, and were, by stamp upon their back at the appro-

priate place for their endorsement, made payable 'to the order of the Secretary of the Treasury, for redemption,' and the payment of the assistant treasurer under such circumstances, for the purchase, did not 'retire' the notes. That upon the face of the transaction required the further order of the Secretary of the Treasury. Undoubtedly it was expected, that, in due course of business, that order would be given; but until given, or at least until it ought to have been given, it cannot be said that the Government has accepted the notes, and adopted them as genuine."

In speaking of the position of the Government when it engages in commercial transactions, this Court in that case said (p. 398):

"Still a Government may suffer through the negligence of its officers. If it comes down from its position of sovereignty and enters the domain of commerce, it submits itself to the same laws that govern individuals there. Thus, if it becomes the holder of a bill of exchange, it must use the same diligence to charge the drawers and indorsers that is required of individuals; and, if it fails in this, its claim upon the parties is lost. United States vs. Barker, 12 Wheat 559. Generally, in respect to all commercial business of the Government, if an officer specially charged with the performance of any duty, and authorized to represent the Government in that behalf, neglects that duty, and loss ensues, the Government must bear the consequences of his neglect. But this cannot happen until the officer specially charged with the duty, if there be one, has acted, or ought to have acted. *As the Government can only act through its officers, it may select for its work whomsoever it will; but it must have some representative author-*

ized to act in all the emergencies of its commercial transactions. If it fails in this, it fails in the performance of its own duties, and must be charged with the consequences that follow such omissions in the commercial world." (Italics ours.)

In the case at bar, the officer selected by the Government to accept the check, did so.

As it is difficulty to imagine any change in the sound doctrine thus announced, and ever since adhered to, the result of the contention of the plaintiff in error would be that we would have one law governing negotiable instruments issued by principals who were big enough to have numerous agents working for them, and another law governing negotiable instruments issued by people who were too small to need agents. For as a matter of fact the rule contended for by the plaintiff in error would not only apply to the Government, to State and municipal governments, but to thousands of transportation, banking and industrial corporations.

(c)

The Uniform Negotiable Instruments Act adopts the doctrine in Price vs. Neal as applicable to a "raised check," and puts an end to the distinction heretofore made between a "raised" check and one on which the drawer's name is forged, even in cases where the drawer and drawee are not the same.

Section 62 of the Uniform Negotiable Instruments Act, codified as Article 13, Section 81, of the Maryland Code of Public General Laws, provides that:

> "The acceptor, by accepting the instrument, engages that he will pay it according to the tenor of his acceptance."

Prof. Ames, whose article on the doctrine in Price vs. Neal has been heretofore referred to, comments on the effect of this section, as applied to raised checks, as follows:

> "Since an acceptor, by Section 62, engages to pay the bill 'according to the tenor of his acceptance,' he must pay to the innocent payee or subsequent holder the amount called for by the bill at the time he accepted, even though larger than the original amount ordered by the drawer. A bank certifying a raised check is in the same case, since Section 187 assimilates a certification to an acceptance. If the acceptor or certifying bank must honor his acceptance or certification in such a case, a fortiori a drawee who pays a raised bill or check, without acceptance or certification, should not recover the money paid from an innocent holder. These results are at variance with numerous American decisions, but they are changes for the better, and, so far as adopted, bring the law of this country into harmony with the law of nearly, if not indeed all, of the European States."

The above is taken from Brannan on Negotiable Instruments, 3rd Ed., page 225, where it appears at the beginning of a note on the effect of this section as adopting the doctrine in Price vs. Neal.

This opinion has been approved in the following cases:

American Hominy Company vs. Milliken National Bank, 273 Fed. 550.

First National Bank vs. United States National Bank, 100 Ore. 264.

Cherokee National Bank vs. Union Trust Co., 33 Okla. 342.

The plaintiff in error refers to McClendon vs. Bank of Advance, 188 Mo. App. 417, and Interstate Trust Co. vs. United States National Bank, 67 Cal. 6, as cases in which the old rule has been applied, unchanged by Section 62.

In the note above referred to, Professor Brannan comments on McClendon vs. Bank of Advance as follows:

> "This leaves undisturbed the question whether an acceptor of a raised, though otherwise genuine instrument, is liable thereon. It is difficult to see how he can escape liability if any meaning is to be given to the words 'engages that he will pay according to the tenor of his acceptance.' The tenor of the acceptance is determined by the terms of the bill as it is when the drawee accepts and that is a bill for the raised amount. That is the bill he accepted and no other, and accordingly to its tenor he has engaged that he will pay it."

In Interstate Trust Co. vs. United States National Bank, the Court was dealing with a check from which the name of the original payee had been erased and a new name inserted. The Court made no reference to Section 62, but rested its decision on this point on cases decided prior to the adoption of the Negotiable Instruments Act. On the other hand, in National City Bank vs. National Bank of the Republic, 240 Ill. 101, the Court decided that under Section 62 a bank which accepted and paid a draft after the name of the original payee had been erased and another substituted, could not recover the money from the bank to which it was paid.

We have already shown that the case at bar is not within the exception to the rule in Price vs. Neal, applied in cases of "raised" papers, because the drawer and drawee are the same person. The effect of the altera-

section of the Negotiable Instruments Act is to abolish that exception in all cases.

Maryland Code of Public General Laws, Art. 13, Sec. 81, is as follows:

> "The acceptor, by accepting the instrument, engages that he will pay it according to the tenor of his acceptance; and admits:
>
> 1. The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and
>
> 2. The existence of the payee and his then capacity to indorse."

2.

THE DEFENDANT IN ERROR, AS A COLLECTING BANK, IS NOT LIABLE IN THIS ACTION, BECAUSE THE PLAINTIFF IN ERROR FAILED TO MAKE DEMAND FOR THE RETURN OF THE MONEY BEFORE IT WAS PAID OVER BY THE DEFENDANT IN ERROR TO ITS PRINCIPAL.

While this rule is but the special application of the general rule applying to those who deal with an agent, yet underlying it will be found the same equitable principles which we have been discussing. Even those Courts which decline to apply strictly the rule in Price vs. Neal, have no hesitancy in holding that the drawee may not recover when such recovery would place the recipient of the money in a worse position than he would have occupied if payment had been refused on presentation. In such a case the equities are not really equal, because the drawee has the burden of the fault, and has been guilty of the negligence, which make the loss possible.

The collecting bank which presents to the drawee a check purporting to have been drawn by that drawee on

himself has a perfect right to assume that if it is paid, the drawee, who has knowledge of the facts, has used that knowledge, and when the collecting bank then pays the money over to its principal, it would be most inequitable for a court to change the loss which has thus been occasioned from the one whose negligence has occasioned it to the one who has been without negligence.

This rule has been invariably applied in cases involving a collecting bank, and is supported not only by the doctrine in Price vs. Neal, but also by the qualification to the right to recover money paid under a mistake, that the recovery can only be had provided the recipient of the payment is not placed in a worse position.

Commercial National Bank vs. Armstrong, 148 U. S. 50.

United States vs. American Exchange National Bank, 70 Fed. 232.

City Bank vs. Westcott, 118 N. Y. 468.

National Park Bank vs. Seaboard Bank, 114 N. Y. 28.

Commercial Savings Bank vs. Citizens Bank, 68 Ind. App. 417.

Wells Fargo & Co. vs. United States, 45 Fed. 337.

National Council vs. Hibernian Bank Association, 137 Ill. App. 175.

Morse on Banks and Banking, 4th Edition, Section 479.

Michie on Banks and Banking, Vol. 2, page 1497.

Crocker-Woolworth National Bank vs. Nevada Bank, 139 Cal. 564.

The rule is well expressed by the Court in National Park Bank vs. Seaboard Bank, which was a suit on a

raised draft, brought against a collecting bank, as follows:

> "If the defendant owned the draft it would have become liable, upon discovery of the facts, to refund the amount mispaid, provided its condition had not in the meantime changed so that this would be unjust. If, however, the defendant did not then own the draft, but merely presented it for payment as the agent of another bank, it could not be required to repay, provided it had paid over to its principal before notice of the mistake."

(a)

It is true that the declaration in this case does not set forth the date when the plaintiff in error made demand upon the defendant in error for the return of the money, but as it is essential to recovery that such demand be made prior to the payment of the money by the defendant in error to its principal, the Court will construe this ambiguity against the pleader, and assume that the demand was not made until after the mony had been so paid over. This is especially true in this case, when the pleader, in the face of the demurrer, refused to amend and elected to stand on the pleading as drawn.

Fressel vs. Mariano, 34 Philippine Rep. 122.
Moore vs. East Tenn. Tel. Co., 142 Fed. 965.
Crocker-Woolworth Bank vs. Nevada Bank, 139 Cal. 564.

The plaintiff has the burden upon it to show that recovery would not subject the other innocent party to a loss.

Union Nat. Bank vs. Farmers & Mechanics Nat. Bak, 271 Pa. 107.

(b)

That the defendant in error was a collecting bank is shown by the indorsements on the check. The indorsement "Pay to the order of any bank, banker or trust company," placed thereon by the Bank of Commerce constituted the defendant in error an agent for collection only, and was notice to the plaintiff in error of that fact.

Bank of Indian Territory vs. First National Bank, 109 Mo. App. 665.
Citizens Trust Co. vs. Ward, 195 Mo. App. 223.
National Bank of Rolla vs. National Bank of Salem, 141 Mo. App. 719.

This rule was not questioned until the passage of the Uniform Negotiable Instruments Act. Since that time there has been a difference of opinion. Some Courts hold, as above, that the Negotiable Instruments Act is merely declaratory of the law as it existed prior to its passage. Others hold that the indorsement in question is not restrictive, but constitutes the indorsee a holder in due course.

Interstate Trust Co. vs. United States National Bank, 67 Col. 6.
National Bank of Commerce vs. Bossemeyer, 101 Neb. 96.

The doctrine announced by these cases, that the Uniform Negotiable Instruments Act changed the law, does not seem to be sound. If one intends to indorse paper to another so as to constitute the indorsee a holder in due course, he does not restrict payment to a bank. This in itself is plainly restrictive, and the Act was drawn and adopted with full knowledge of the decisions which held

that such an indorsement constituted the indorsee a mere agent for collection. Again, such indorsements are always followed, as in the case at bar, by the further indorsement "Indorsements guaranteed." If the indorsement "Pay to the order of any bank, banker or trust Company" is not restrictive, there would be no necessity for the added guaranty, because a general indorsement guarantees the genuineness of all prior indorsements.

In addition to the two cases mentioned, the plaintiff in error cites New York Produce Exchange Bank vs. Twelfth Ward Bank, 135 App. Div. 52. The point was not at issue in that case, as the check involved was collected through the Clearing House by the bank in which it was first deposited. In Interstate Trust Company vs. United States National Bank, 67 Col. 6, it is to be noted that the suit was against both the collecting bank and the bank which cashed the check.

(c)

Neither does the indorsement placed on the check by the defendant in error, "Received payments through the Baltimore Clearing House, Indorsements guaranteed," make the defendant in error liable in this action.

It is to be noted that there is no intention here to transfer the paper, the indorsement being nothing but a receipt for the payment of the money, and therefore the only part to be considered is the effect of the words "Indorsements guaranteed."

A drawee of a check is charged with knowledge of the drawer's signature, but is not charged with knowledge of the payee's signature or other indorsements, because he has no way of knowing if they be genuine. If the payee presents the check in person to the drawee, unless the

drawee knows him, he requires him to be identified; and if the check is sent through the Clearing House, the drawee requires the bank presenting the check to guarantee the genuineness of the indorsements for the same reason. "Indorsements guaranteed" merely guarantees the genuineness of the prior indorsements, and does not purport to guarantee the genuineness of the paper in its entirety. In the case at bar, the defendant in error guaranteed that the indorsement "Joe Clenton Beck" was written by Joe Clenton Beck, and that the indorsement "Pay to the order of any bank, banker or trust company. All prior indorsements guaranteed" was written by the Bank of Commerce. That is all it guaranteed, and it is admitted that these indorsements are genuine.

National Bank of Commerce vs. Mechanics American Nat. Bank, 148 Mo. App. 1.

Tradesmen's State Bank vs. Ft. Worth Elevators Co., 214 S. W. 656.

Johnston vs. Schnabaum, 86 Ark. 82.

Daniels on Negotiable Instruments, 6th Ed., page 773.

In this connection, we quote again from Professor Ames' article in the Harvard Law Review, supra, in which, speaking of a general indorsement by the holder on presentment for payment, he says:

> "By presentment for payment, he does not assert, expressly or by implication, that the bill is his, or that it is genuine. He, in effect, says: 'Here is a bill, which has come to me, calling by its tenor for payment by you. I accordingly present it to you for payment, that I may either get the money, or protest it for non-payment.' * * * The notion that the holder's indorsement of his name on the bill at the time of payment is a warranty of the genuineness of the

> bill, although not without judicial sanction, should be strenuously resisted. The so-called indorsement is not an indorsement at all, but simply a receipt of payment."

The cases of New York Produce Exchange Bank vs. Twelfth Ward National Bank, 135 App. Div. 52, and Interstate Trust Co. vs. United States National Bank, 67 Col. 6, support the contention that the words "Indorsements guaranteed" amount to a guaranty of the genuineness of the instrument in all particulars to the drawee. Both cases, however, admit that the indorsement did not guarantee the genuineness of the drawer's signature to the drawee. It is therefore really not necessary to go into this conflict of opinion, because it is of no avail to the plaintiff in error, who is both drawee and drawer of the check. Even the two cases which hold that "Indorsements guaranteed" is equivalent to guaranteeing the genuineness of the whole instrument, recognize Price vs. Neal to the extent of holding that it does not guarantee the genuineness of the drawer's signature to the drawee. Bearing in mind then, that in the case at bar, the plaintiff in error is both drawer and drawee, it is evident that even those cases which really hold that the Negotiable Instruments Act has broadened the effect of this indorsement; when they except the genuineness of the drawer's signature from the guaranty to the drawee, they must, for the same reason, except the amount, when the drawee is also the drawer.

Moreover, the question, in so far as it applies to the case at bar, is settled by the specific terms of the Uniform Negotiable Instruments Act. By the terms of that Act the indorser warrants the validity and genuineness of the instrument to all *subsequent holders in due course.*

> Maryland Code of Public General Laws, Art. 13, Sec. 85.

Presentment for payment to the drawee of a check is not a negotiation, and the drawee by payment does not become a holder in due course; and the indorser's warranty of validity and genuineness does not run to such drawee.

American Hominy Co. vs. Millikin Nat. Bank, 273 Fed. 550.

National Bank of Commerce vs. Seattle Nat. Bank, 109 Wash. 312.

Figures vs. Fly, 137 Tenn. 358.

Farmers & Merchants Bank vs. Bank of Rutherford, 115 Tenn. 64.

State Bank vs. Cumberland Savings & Trust Co., 168 N. C. 605.

Cherokee Nat. Bank vs. Union Trust Co., 33 Okla. 342.

And this, even when "Indorsements guaranteed" is added.

First Nat. Bank vs. United States Nat. Bank, 100 Ore. 264.

Article 13, Section 85, of the Maryland Code of Public General Laws, reads as follows:

"Every indorser who indorses without qualification warrants to all subsequent holders in due course:

1. The matters and things mentioned in sub-divisions one, two and three of the next preceding section; and

2. That the instrument is at the time of his indorsement valid and subsisting.

And, in addition, he engages that, on due presentment, it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dis-

honored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it."

Sub-divisions one, two and three of the next preceding section are as follows:

"1. That the instrument is genuine and in all respects what it purports to be;

2. That he has good title to it;

3. That all prior parties had capacity to contract."

(d)

While it is true that the declaration alleges that the Bank of Commerce "negotiated the said check for value in the usual course of business, to, and received therefor, from the defendant, the sum of forty-seven hundred and fifty dollars," and that the defendant in error "negotiated the said check for value in the usual course of business, to, and received therefor, from the Baltimore Branch of the Federal Reserve Bank of Richmond, the agent of the plaintiff, the sum of forty-seven hundred and fifty dollars," these allegations are merely conclusions of law on the part of the pleader, and are of no avail to him in view of the fact that the indorsements on the check are set out in full in the declaration. These indorsements, as has been shown, negative the conclusions of law so drawn by the pleader. To claim that payment of the check by the agent of the plaintiff in error, upon presentation, constitutes a negotiation of the check to the plaintiff is to ignore the decisions, as well as the specific provisions of the Uniform Negotiable Instruments Act.

The demurrer does not admit the correctness of the

pleader's conclusions of law as to the legal effect of the indorsements set forth in the declaration. That is for the Court to determine, and it will do so irrespective of the pleader's averments.

Hitchcock vs. Buchanan, 105 U. S. 418.
Dillon vs. Barnard, 88 U. S. 430.
Interstate Land Co. vs. Maxwell Land Co., 139 U. S. 569.
Ryan vs. McLane, 91 Md. 175.

Conclusion.

It is therefore respectfully submitted that the action of the lower Courts in sustaining the demurrer to the declaration in this case was correct—

1. Because this case is governed by the doctrine of Price vs. Neal, and the Court will not intervene to transfer a loss from one innocent person to another innocent person, but will let the loss remain where the course of business has placed it. And the fact that this case deals with a raised check, does not exempt it from the doctrine in Price vs. Neal: (1) because the drawer and drawee of the check were the same, and none of the reasons advanced for excepting raised checks from this doctrine apply in such a case, and (2) because that exception has been abolished by the Uniform Negotiable Instruments Act.

2. Because this loss was brought about entirely by the negligence of the plaintiff in error in paying the check on presentation, and as it failed to discover the error and make demand for repayment of the money before the defendant in error was placed in a worse position than

it would have been if payment had been refused on presentation, the Court will not permit the plaintiff in error to save itself from the result of its own negligence by throwing the loss upon the innocent defendant in error who was misled thereby.

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